FILE COPY

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1959

No. 616

MARY BRIGGS,

Petitioner,

vs.

HONORABLE VERNON D. FORBES, District Judge of the Territory (now State) of Alaska, Fourth Division, and JOHN B. HALL, Clerk of the Fourth Judicial District of said District Court,

Respondents,

and vs.

ALASKA HOUSING AUTHORITY, a public corporate authority,

Intervenor.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

FRED CRANE,
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511½ Second Avenue, Fairbanks, Alaska,
Attorneys for Petitioner.

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for the Ninth Circuit.

The Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this cause.

OPINIONS BELOW.

The opinion of the District Court for the District of Alaska, Fourth Judicial Division has not been reported. A copy is appended as Appendix A.

The opinion of the Court of Appeals has not been reported. A copy is appended as Appendix B.

The opinion of the Court of Appeals in *Parker v. McCarrey*, No. 16,499, June 16, 1959, has not been reported. A copy is appended as Appendix C.

JURISDICTION.

The judgment of the Court of Appeals was entered August 18, 1959. (Appendix B.)

A motion for rehearing was denied October 6, 1959. (Appendix D.)

Jurisdiction to issue the writ rests on Title 28, United States Code Annotated, Sec. 1254 (1).

QUESTIONS PRESENTED.

Whether the guaranty of a republican form of government, Article IV, Sec. 4, United States Constitution extends to and includes the conjoint acts of the Convention of Alaska (Art. XV, Sec. 17, Constitution of Alaska) and the Congress (Sec. 18, Public Law 85-508, 72 Stat. 339) to continue the administration of justice within the State for a limited period of time as though the State had not been created?

If so, whether the deletions of Sec. 12, PL 85-508 discontinue the jurisdiction of the Court of Appeals over the appealable decisions and judgments issued by the United States District Court for the Territory of Alaska during such period of time?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Art. IV, Sec. 4, United States Constitution; Art. XV, Sec. 17, Constitution of Alaska; Public Law 85-508, 72 Stat. 339, Secs. 12-18 are involved here and set out fully in Appendix. E.

The portion of the Alaska Constitution and Sec. 18, Public Law 85-508, are set out here:

Article XV—Schedule of Transitional Measures. To provide an orderly transition from a territorial to a state form of government, it is declared and ordained:

* * *

Section 17. "Until the courts provided for in Article IV are organized, the courts, their jurisdiction, and the judicial system shall remain as constituted on the date of admission unless otherwise provided by law. When the state courts are organized, new actions shall be commenced and filed therein, and all causes, other than those under the jurisdiction of the United States, pending in the courts existing on the date of admission, shall be transferred to the proper state court as though commenced, filed, or lodged in those courts in the first instance, except as otherwise provided by law."

Pub. Law 85-508, 72 Stat. 350, Sec. 18. "The provisions of the preceding sections with respect to the termination of the jurisdiction of the District Court for the Territory of Alaska, the continuation of suits, the succession of courts, and the satisfaction of rights of litigants in suits before such courts, shall not be effective until three years after the effective date of this Act, unless the President, by Executive Order, shall sooner proclaim that the United States District Court for the District of Alaska, established in accordance with the provisions of this Act, is prepared to assume the functions imposed upon it. During such period of three years or until such Executive order is issued, the United States District Court for the Territory of Alaska shall continue to function as heretofore. The tenure of the judges, the United States attorneys, marshals, and other officers of the United States District Court for the Territory of Alaska shall terminate at such time as that court shall cease to function as provided in this section."

STATEMENT OF THE CASE.

On June 9, 1958, the Alaska Housing Authority, a public corporate authority, filed in the District Court for the District of Alaska, Fourth Judicial Division, its complaint in condemnation and to quiet title to certain real property against petitioner. On the same day it filed a declaration of taking, all pursuant to the laws of the Territory of Alaska. Thereafter, petitioner filed motions to dismiss the complaint, to quash the service of summons, and to strike the declaration

of taking, all of which motions were denied by the District Judge on August 22, 1958. On September 12, 1958, an order was entered by the District Judge granting possession of the property to the Authority. A motion by petitioner to set aside said order was denied by the District Judge on the 10th day of February, 1959.

Petitioner refused to surrender and deliver up possession of the real property, and thereafter a writ of assistance was issued out of the District Court directing the United States Marshal to secure physical possession of the property on behalf of the Authority. Petitioner then moved to quash the writ of assistance, which motion was denied on April 28, 1959. (See Appendix A.) Petitioner thereafter sought leave of the Court of Appeals under Section 28 U.S.C.A. 1292 (b) to appeal from the order denying petitioner's motion to quash the writ of assistance. On May 7, 1959, the Court of Appeals denied, without opinion, petitioner's application to appeal from said interlocutory order. On May 12, 1959, petitioner applied to the Court of Appeals for leave to file a petition for writ of prohibition to be directed to the District Judge and the Clerk of the Court, prohibiting them from further proceedings beyond the jurisdiction conferred upon the Court by the eminent domain and slum clearance statutes of the Territory (now State) of Alaska. On June 2, 1959, the Court of Appeals granted petitioner's petition for leave to file a petition for writ of prohibition to be directed to respondents and, on said date, issued its order to show cause before it why said peti-

tion should not be granted and ordered that all proceedings in the Court of respondents be stayed until further order.

To this point, petitioner's efforts were directed soley toward obtaining a hearing particularly prescribed by pertinent Territorial (now State) statute.

Meanwhile, in Alaska, a course of political events was interjected into petitioner's situation so as to convert her quest for a hearing into one for a forum in which to be heard. And, which brings her here, as will be shown by the subsequent facts.

On April 24, 1956, by a vote of the people of Alaska, a Constitution for a proposed State was adopted. On July 7, 1958, in the enacting clause of Public Law No. 85-508,—"An Act to provide for the admission of the State of Alaska into the Union."—Congress accepted, ratified, and confirmed that Constitution, after finding it "to be republican in form and in conformity with the Constitution of the United States and the principles of the Declaration of Independence."

On January 3, 1959, the President issued his Proclamation announcing the election in Alaska of two Senators and one Representative in Congress, and the State of Alaska was deemed admitted into the Union.[1]

Following January 3, 1959, Sec. 18 of PL 85-508 and Sec. 17 of Art. XV, Alaska Constitution came into prominence. The gist of the Alaska section is that the jurisdiction of the courts and the "judicial system shall remain as constituted on the date of admis-

[1]Proclamation No. 3269, 24 F. R. 81.

sion," until the organization of the permanent Alaska system. The Congressional counterpart (Sec. 18) provides that the United States District Court for the Territory of Alaska shall continue to function as heretofore until the United States District Court for the District of Alaska is "prepared to assume the functions imposed upon it". Prior to admission, the Territorial Court had functioned in a dual capacity as to both Federal and non-Federal causes.[2] After the admission of Alaska into the Union, the District Court for the Territory "remained and continued" to exercise its powers and jurisdiction (both State and Federal) upon all challengers.

Congress had effected a judicial system for the Territory by the specific inclusion of the District Court for the Territory of Alaska within the functions of sections 1291, 1292, and 1294, Title 28, U.S.C.A. Mainly because of the summary manner in which Sec. 12 of the Statehood Act purported to delete from the Code all reference to the Territorial Court, differing constructions arose, as to what courts constituted the transitional system, and uncertainty engulfed the Alaska court situation. A consolidation of cases bearing on the judicial sections of Alaska and Congress brought to the scrutiny of the Court of Appeals the nature and extent of the Territorial Court system when it was projected through the date of admission until the functioning of the permanent State and Federal organizations in the presence and correlation with each other. The principal questions were the

[2] 48 U.S.C. Sec. 101.

validity of the jurisdiction asserted by the District Court for the Territory over Federal cases, and the appellate jurisdiction of the Court of Appeals over State and/or Federal decisions in Alaska. This group of cases is commonly referred to as the case of *Parker v. McCarrey*, C. C. A. 9th, No. 16,499.

Parker, having been charged with a Federal offense, prior to the admission of the State, sought an extraordinary writ to stop the threat of his impending trial, after the admission of the state, in any court other than a United States District Court, staffed with a life-tenure (good-behavior) Judge. While Parker construed no appellate jurisdiction in the Court of Appeals, he relied on that Court's future appellate jurisdiction to give it present power to stop the proceedings in the Court below.

The Attorney General of the United States, as Amicus Curiae, agreed with Parker that the appellate jurisdiction of the Court of Appeals ceased as of January 3, 1959, the date of admission, not only as a result of Sec. 12 (e) (g), but especially because of the *fact* of admission which automatically abrogated the territorial authority of Congress. On the other hand, the Government attorney disagreed with Parker that he could not now be successfully prosecuted in Alaska for a Federal offense, since such holdover courts, as Parker was objecting to in Alaska, historically acted as State courts; therefore, since the District Court for the Territory of Alaska was actually a court of the State of Alaska after January 3, 1959, Parker could properly be tried there, as that Court had been con-

ferred with jurisdiction to try civil and criminal cases arising under the Constitution, laws and treaties of the United States. (No mention was made by the Government of its admiralty jurisdiction.)

The Attorney General of the State of Alaska, as Amicus Curiae, took the position upon the construction of the Constitution of Alaska and legislation pursuant to that Constitution that the State preferred to look upon the continuing District Court for the Territory in its dual capacity as a legislative court of the United States; that the necessity to Alaska for the continuance of the *judicial system* and the necessity of the Court of Appeals as an integral part of that *system* determined the extent of the system arranged for by Congress; and that the arrangement, itself, was an incident of the power of Congress to admit States into the Union. Thus the State of Alaska recognized and relied on the Court of Appeals as the transitional appellate court for Alaska.

On June 16, 1959, the Court of Appeals issued its decision in *Parker v. McCarrey* (Appendix C), that its "jurisdiction on decisions or judgments rendered in Alaska after January 3, 1959," would appear to be restricted by the amendments to the Code to "those coming up from the newly-created United States District Court for the District of Alaska" whenever it came into existence. In view of the finding on its own jurisdiction, the Court deemed it "unwise to speculate as to the nature of the interim Court" in Alaska.

Following the decision in *Parker*, Alaska Housing Authority, on June 25, 1959, petitioned to intervene

in petitioner's proceedings in the Court of Appeals, and, on the same day, lodged its petition to dismiss the petition for writ of prohibition sought by petitioner.

Hearing on the order to show cause why the petition for writ of prohibition should not be granted and Intervenor's petition to dismiss the petition for prohibition were heard by the Court of Appeals on August 13, 1958. Intervenor, in its petition to dismiss, relied primarily on the lack of appellate jurisdiction in the Court of Appeals per *Parker v. McCarrey*.

Intervenor advanced no objections as to the power of the Court of Appeals to exercise appellate jurisdiction, but simply interposed the Court's own decision in *Parker* as the obstacle to its jurisdiction to entertain petitioner's petition.

Petitioner urged the Court to regard its *Parker* decision as a nullity, for Parker's petition had presented it with no question of person or property for judicial determination, but only a question political in nature; his petition was essentially directed to the form of his government of and within Alaska as a State of the United States. Petitioner further urged, that by reciprocal acts under the guaranty clause of Art. IV, Sec. 4, U. S. Constitution, which each was competent to make, the Convention of Alaska through Art. XV, Sec. 17 and Congress through Sec. 18, Pf. 85-508, had effected the transitional court system of Alaska; that the measure of the system came from those sections construed together; that the State of Alaska recognized the Court of Appeals as a court of

transitional government; that Congress recognized Alaska as a State; and, by these political facts, the Court of Appeals was bound to recognize its part in the transitional government of Alaska.

On August 18, 1959, the Court of Appeals dismissed petitioner's petition for lack of jurisdiction citing *Parker v. McCarrey.* (Appendix B.)

On October 6, 1959, petitioner's motion for rehearing was denied by the Court of Appeals. (Appendix D.)

BASIS OF FEDERAL JURISDICTION.

Federal jurisdiction is based upon the fact that the proceedings in the Court of first instance were begun prior to the admission of Alaska into the Union.

ARGUMENT FOR REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

THE COURT OF APPEALS ERRED IN DETERMINING ITS JURISDICTION WITHOUT REFERENCE TO THE INTENT OF CONGRESS AND THE CONVENTION OF ALASKA.

Art. XV, Sec. 17, Alaska Constitution, and Sec. 18, Act of Admission, are unprecedented as appearing in either the State Constitution or the Act of Admission by Congress in the history of the admission of States into the Union. As such, these sections present an original problem of construction.

The delay incidental to the organization of her permanent judiciary prescribed by Article IV, Constitution of Alaska, made necessary a temporary Court

system for the State after her admission. However, the federal structure peculiar to the judicial system of the Territory focused the attention of the Convention on the precarious relation in which the Court of Appeals might stand to the State, as an Appellate Court, should the succession of the courts of the United States historically required by the fact of admission occur at the time of admission, without some special provision of Congress on the subject. Thus, Art. XV, Sec. 17 of the Alaska Constitution looked for implementation by the Congress. (As did all the transitional measures.)

When this portion of the Alaska Constitution was called to the attention of the Congress, that body responded by the addition of Sec. 18 to its already existing provisions.[3] Those provisions were predicated upon the fact of admission and the succession of courts necessary upon the change of government to prevent *loss of rights, interruption of* jurisdiction or prejudice to matters pending.

There is no legislative history here to support a theory that Congress intended a diminished power of the State as the price of admission, as was supposed in *Cogle v. Oklahoma*, 221 U. S. 559, nor does the legislation of Congress here or the structure of the Territorial Court system create a parallel between the factual situation of *Bonner v. Porter*, 9 How. 246. The only reasonable conclusions that can be drawn from the legislative history are that Sec. 18, Pub. Law 508, was prompted by Art. XV, Sec. 17, Alaska

[3]See Appendix F.

Constitution, that the Congressional section was enacted to accommodate the sense "of the preceding sections" to that of the Alaska Constitution; that the two are inextricably tied to provide a complete court system for Alaska during her transitional period; and that the *Alaska Constitutional provision* so implemented, is the fundamental law as to the nature and extent of that system.

Beginning, then, with the Alaska Constitutional section, and understanding the intent of Congress to coordinate the organization of its permanent Court in Alaska with the organization of the Alaska Art. IV Courts, the transitional judicial system that "remains and continues" in Alaska is simply a projection of the territorial system of courts through the date of admission until the successor courts of both the United States and the State of Alaska are prepared to assume their functions; such preparation to be announced by *Executive order* of the President, at which time the District Court for the Territory of Alaska shall relinquish its case load, records and jurisdiction unto its successors, according to their nature and authority. Any other construction of the Alaska provision and the Congressional section, whether taken separately or in any combination, does not provide the orderly satisfaction of rights of Alaska litigants to which both the Convention and Congress directed their efforts. Petitioner might add parenthetically here that Sec. 8 (d) (Appendix G) was pointed out to the Court of Appeals as the significant portion of PL 85-508 wherein Congress specifically adjusted both the Terri-

torial laws and the laws of the United States to the requirements of the period of transitional government in Alaska.

THE COURT OF APPEALS ERRED IN DETERMINING ITS JURISDICTION WITHOUT REFERENCE TO PRIOR DECISIONS OF THIS COURT.

There are defined lines of decisions of this Court which petitioner believes to be applicable and controlling here.

(A) It is well established by prior decisions of this Court that a State, at the moment of her admission, is possessed of all the powers she will ever have. *Coyle v. Oklahoma*, 221 U. S. 559. This possession of power extends to the designation of the courts through which her judicial power shall be temporarily administered. *Benner v. Porter*, 9 How. 246, 253. *Ames v. Colorado Cent. R. Co.*, 1 Fed. Cas. 750, 752. Whether a court of appellate jurisdiction is necessary to the full exercise of her judicial power is a proposition not arguable. It follows, then, that with Alaska in possession of her full power, upon her admission, and with the power of the convention to designate the machinery for the temporary administration of the State's full exercise of judicial power, that Art. XV, Sec. 17, was consistent with the power of the State, and should have been given its full operation by the Court of Appeals.

(B) By far the strongest line of decisions, adhered to without deviation since *Luther v. Borden*, 7 How. 1, and best expressed in *Pac. States Tel. and Tel. v. Oregon*, 223 U. S. 118, 142, is that it is not the prov-

ince of the judiciary "to substitute its judgment as to a matter purely political for the judgment of Congress on a subject committed to it." Although petitioner urged, by brief and argument, that the Convention of Alaska was the political fountain from which the form of government for the State flowed, that it was that form which Congress examined, and implemented by statute, and recognized as a State of the United States; that therefore, the courts were bound by the recognition by Congress of the form of Alaska's transitional government and, that any finding, by the Appeals Court, that it lacked appellate jurisdiction would have to be referable to an intent on the part of Congress and Alaska to that effect, for Intervenor offered no objection to its jurisdiction other than the *Parker* decision, itself. Yet, the Court of Appeals refused petitioner's reasoning and interposed the *Parker* decision between her and an appellate forum. The effect of the Court's decision, itself, raised the question whether the guaranty clause of Art. IV, Sec. 4, United States Constitution, extends to these mutual acts of Alaska and Congress to which petitioner must look and rely for the temporary administration of the judicial power of Union within the State of Alaska.

THE PARKER DECISION IS INCONSISTENT WITHIN ITSELF AND LOOKS TO A DECISION BY THIS COURT.

The Court of Appeals, in determining its own jurisdiction, said, "It would appear that the amendments to Titles 18 and 28 made by Sec. 12 of the Enabling Act would automatically restrict our Alaska jurisdic-

tion on 'new business' to the United States District Court for the District of Alaska." Reference to Sec. 12 shows that the amendments there are both additions and deletions to Titles 18 and 28. Sub-sections (a), (b), (c) are additions relative to the United States District Court for the District of Alaska; sub-sections (d) through (q) are deletions relative to the District Court for the Territory of Alaska. The catch-line of Sec. 12 reads, "Effective upon the admission of Alaska into the Union." It is obvious that Congress intended all sub-sections (a) through (q) to be effective at the same time without regard to content; otherwise, it would have indicated different effective dates for the sub-sections. After holding that the effect of sub-sections (e) and (g) as of January 3, 1959, the date of admission, was to remove the District Court for the Territory from its appellate cognizance, the Court said of the Court contained in sub-sections (a), (b), (c), "*It is possible that the* District Court for the District of Alaska is in existence now and is just not staffed, or it may be that it comes into existence when the President appoints the federal district judge therefor. *That is a question we do not decide.*" (Emphasis added.) This construction of Sec. 12 places January 3, 1959, as an effective date upon sub-sections (d) through (q), without deciding whether sub-sections (a), (b), (c) of the same section are controlled by that date, and is contrary to the expression of Congress within the terms of that section.

This same conflict repeats itself when applied to the terms of the crucial deletion of Title 28 U. S. C. A., Sec. 1291. Before amendment, that section reads:

Sec. 1291. Final decisions of district courts.

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska . . ."

Sec. 12 of the Admission Act adds a court in Alaska and deletes a court in Alaska from the function of this section of the Code,—the addition and deletion to occur simultaneously. The functional relationship of the Court of Appeals is the same to both Alaska courts. Sec. 18 of the Admission Act deals with the same two Alaska Courts; it qualifies the establishment of the one, and qualifies the termination of the other. The inconsistency of *Parker*, here, is that it allows the United States District Court for the District of Alaska to enter Sec. 1291 with its qualifying conditions attached, but, on the other hand, the qualifying conditions of Sec. 18 attached to the District Court *for the Territory are* ~~now~~ allowed to delay the departure of that Court from the section. Since Sec. 18 delays the *succession of courts*, and by Sec. 16, the United States District Court is a successor court to the District Court for the Territory, it seems reasonable that the succession of courts should occur for all purposes at the same time.

The *Parker* decision fails to harmonize the legislation with which it dealt into any satisfactory plan consistent with the purpose for which the legislation was enacted.

In the last analysis, the Court of Appeals, through *Parker*, has said to this petitioner, "We lack jurisdic-

tion over your petition, until it is determined by a higher court whether or not we have such jurisdiction." This Court is the only Court that can make the determination of that question, under the Admission Act of Congress.

CONCLUSION.

The decision of the Court of Appeals is in direct conflict with the fundamental law of Alaska and Congress ordaining and declaring the organization of courts for Alaska's transitional government. Such a decision requires correction by this Court to restore meaning to the guaranty of Art. IV, Sec. 4, U. S. Constitution, a republican form of government.

Dated, Fairbanks, Alaska,
December 22, 1959.

Respectfully submitted,
FRED CRANE,
ROBERT A. PARRISH,
Attorneys for Petitioner.

(Appendices A, B, C, D, E, F and G Follow.)

Appendix A

In the District Court for the District of Alaska
Fourth Judicial Division

No. 10,017 Civil

Alaska Housing Authority, a public corporate authority,
Plaintiff,
vs.
Joe Janson, a/k/a J. M. Jansen, a/k/a Joseph M. Jansen; Mary Bridges, et al.,
Defendants.

Fairbanks, Alaska,
April 28, 1959

Appearances:
Clifford J. Groh, Esq., of Anchorage, Alaska, and Henry J. Camarot, Esq., of Fairbanks, Alaska,
Attorneys for plaintiff:

Robert A. Parrish Esq., of Fairbanks, Alaska, attorney for defendant Mary Bridges.

Before:
Hon. Vernon D. Forbes,
District Judge.

Transcript of the Court's Ruling Denying Defendant's Motion to Quash Writ of Assistance
On April 28, 1959

The Court: The processes of reason are in all events difficult to apply, at least I am speaking of my

own ability or inability to reason, and it is unfortunate that for some time now I have been unable to disabuse my mind of various clouds. But doing the best I can under rather unfortunate circumstances, unfortunate for litigants, I am going to rule in this case, and I hope that I can spell out the reasons for my ruling.

It would be better, I am sure, not to comment at all, but I don't know how much the result I will reach is affected by the peculiar flimsy thread of tenure. I hope it has no effect whatsoever. In more than four years on this bench, I have never been called upon to comment on the ruling of a Judge in the case in which a subsequent ruling is required touching similar, if not the same, questions of law.

It is a rather awkward position to be in, but I don't say that the defendant's urgence of the motion again is untenable but so much seems clear to me, and I have read and reread the opinion of the Honorable J. L. McCarrey, dated August 23, 1958. Nobody has mentioned this point, neither plaintiff nor defendant, so far as I know, but in the Memorandum Opinion he refers—Judge McCarrey, in his Order, refers to the motion to dismiss, and I can't find any reference to the motion to strike, and I suppose that he intended the Order to apply to both.

I realize that jurisdictional matters can be raised any time, even for the first time upon appeal, but when it comes to re-urging them, I am not so sure. And I don't know what good this is going to do to

make this comment, but Judge McCarrey did specifically hold that the taking act, declaration of taking, was and is available to the plaintiff, Alaska Housing Authority. He did so by construing the language of Section 40-7A-9 of the 1949 Supplement to be a successful attempt on the part of the Legislature to provide for future contingencies in the ever-changing field of urban renewal and eminent domain, and he said, "Where the legislative intent is clear it should be followed," and he so held.

If I were sitting as a member of a reviewing Court, it would be a different matter, but that is certainly not my position, to review the findings of a Judge of equal stature and dignity as myself, and I am not going to disturb the previous Order even though I may disagree with it, because it is certainly based on some logic. If it were clear to me that it was inadvertent and ridiculous, I might be tempted to adjust what appears to be wrong, but he has some reason. And as I say, the mere fact that I disagree with that reason is not enough for me. I think I would be greatly criticized by an appellate court, whatever court that may be, if I should put myself up as some great authority and reverse a Judge of equal stature. I don't propose to do that.

I think that Judge McCarrey also determined the sufficiency of the petition. He denied the motion to dismiss and he must have felt that the petition was sufficient to withstand such a motion. I am not so sure that I agree with that decision of his, but that is not important. The only important thing to this de-

fendant is whether I choose to scrap the former Order, and I do not choose to do so.

If I were on the appellate court hearing this matter, I believe that I would adopt the argument of defense counsel, because I could not state it in such eloquent words, and that might be the majority opinion or the minority opinion, I don't know, but I believe with counsel for the defendant that these rights, property rights, are very important; that this should not be decided on the rule of expediency but should be decided on the rule of law. I don't believe that the complaint is sufficient. I think that it is fatally defective for failure to allege clearly matters that give the Court jurisdiction, but there is argument to the contrary and I am not sitting in review.

I agree with counsel for the defendant that such important rights as declaration of taking, is a right that must be plainly conferred. I think the Trial Judge as much as said it is not plainly conferred but he could reason it out that it was conferred upon this plaintiff.

I further think that in actions of this kind that strict compliance with the statute is an absolute requirement. I don't think there has been strict compliance.

Counsel for the defendant disagrees with me and what my duties are in a situation of this kind, and I don't criticize his position at all, but I don't believe, after a good deal of thought and study, that I should disturb the Order of another Judge, in the

same action at least, and so it is with a rather heavy heart and with no firm belief that I am doing the right thing, I at this time respectfully deny the motion to quash the writ of assistance.

I feel that the defendant has legal remedies and I am sure this matter will be determined by a Court of higher authority. The plaintiff may well be within its rights in refusing, respectfully of course—refusing the invitation that I extended more than once, the invitation to move to amend and the invitation to have a hearing to determine the public purpose and necessity for this particular tract for that purpose, but the matter is now closed, and you may present an order accordingly.

Mr. Parrish. If the Court please, I don't know just how fast the plaintiff expects to move in this regard. I would move the Court for ten days before execution upon this Order takes place.

The Court. Mr. Groh, Mr. Camarot, do you want to confer?

Mr. Camarot. May we confer just a moment?

The Court. Yes, I will take a five-minute recess.

(Thereupon a recess was taken.)

Clerk of Court. Court is reconvened.

The Court. Mr. Groh.

Mr. Groh. If the Court please, ten days is certainly agreeable.

If Your Honor would permit me, I would respectfully like to say something in connection with Your

Honor's comments. Your Honor's invitation to amend the complaint, of course, has not been ignored. There is in my mind, very frankly, a substantial question in what areas it needs amending. I recognize Mr. Parrish's strong objections to various portions of it. I don't happen to agree with it.

In connection with Your Honor's comment on the hearing, I have been prepared to go forward with a hearing this afternoon. I did not know that Your Honor might not rule and we would have a hearing and, I would have gone forward with the hearing.

It is immaterial, in connection with what Mr. Parrish calls the jurisdictional requirement, which I call the procedural requirements, is available, and as I indicated this morning we have file cabinets full of them. And, of course, Your Honor's comment that there has not been substantial and strict compliance or strict compliance with the statute, insofar as it is humanly possible to have strict compliance with our inconsistent provisions between Federal rules and your State rules, there has been compliance from our standpoint.

Thank you, Your Honor.

The Court. It will be the further Order of the Court that execution of the writ of assistance be stayed for a period of ten days from the date hereof.

Mr. Parrish. Thank you, Your Honor.

United States of America,
State of Alaska.—ss.

I, Esther M. Rasmussen, official court reporter for the aforementioned Court, do hereby certify that the foregoing pages, numbered 1 to 6, inclusive, constitute a full, true and accurate transcript of that portion of my original shorthand notes taken at the time of the oral proceedings had in open Court upon the 28th day of April, 1959, in Cause No. 10,017 Civil.

Dated at Fairbanks, Alaska, this 28th day of April, 1959.

/s/ Esther M. Rasmussen.

Appendix B

United States Court of Appeals for the Ninth Circuit.

MARY BRIDGES, *Petitioner*, vs. HONORABLE VERNON D. FORBES, District Judge of the Territory (now State) of Alaska, Fourth Division, and JOHN B. HALL, Clerk of the Fourth Judicial District of said District Court, *Respondents*, and vs. ALASKA HOUSING AUTHORITY, a public corporate authority, *Intervenor*.	No. 16,487 Aug. 18, 1959

Orders on Petition for Writ of Prohibition, Motion to Intervene, and Motion to Dismiss the Petition for Writ of Prohibition.

Before: Chambers and Jertberg, Circuit Judges, and Ross, District Judge.

Per Curiam:

On June 2, 1959, this court granted petitioner's petition for leave to file a Petition for Writ of Prohibition to be directed to the respondents and, on said date, issued its order to show cause before this court why said Petition for Writ of Prohibition should not

be granted and ordering that all proceedings in the court of respondents in this matter be stayed until the further order of this court, which order to show cause was amended by order of this court dated the 29th day of June, 1959.

On June 25, 1959, Alaska Housing Authority, a public corporate authority, petitioned this court to intervene in the above proceedings and, on the same day, lodged with the clerk of this court a petition to dismiss the Petition for Writ of Prohibition sought by petitioner.

On June 9, 1958, the Intervenor, the Alaska Housing Authority, a public corporate authority, filed in the district court its Complaint in Condemnation and to quiet title to certain real property against petitioner. On the same day, it filed a Declaration of Taking, all pursuant to the laws of the Territory (now State) of Alaska. Thereafter, petitioner filed motions to dismiss the complaint, to quash the service of summons and to strike the Declaration of Taking, all of which motions were denied by the district judge on August 22, 1958. On September 12, 1958, an order was entered by the district judge granting possession of the property to the Authority. A motion by petitioner to set aside said order was denied by the district judge on the 10th day of February, 1959.

Petitioner refused to surrender and deliver up possession of the real property and thereafter a Writ of Assistance was issued out of the district court directing the United States Marshal to secure physical possession of the property on behalf of intervenor.

Petitioner then moved to quash the Writ of Assistance, which motion was denied on April 28, 1959. Petitioner thereafter sought leave of this court, under Section 28 U.S.C.A. 1292(b) to appeal from the order denying petitioner's motion to quash the Writ of Assistance. On May 7, 1959, this court denied petitioner's application to appeal from said interlocutory order.

Hearing on the Order to Show Cause why the petition for Writ of Prohibition should not be granted and intervenor's Petition to Dismiss the Petition for Prohibition were heard by this court on the 13th day of August, 1959, and, this court being fully advised in the premises.

Now, therefore, it is ordered:

(1) The motion of Alaska Housing Authority to intervene in the proceedings before this court is granted and the clerk of this court is directed to file the Motion to Intervene, as well as the Petition of Intervenor to Dismiss Petitioner's Petition for Prohibition.

(2) Petitioner's Petition for Writ of Prohibition is denied for lack of jurisdiction of this court to entertain the petition. See Parker v. McCarrey, decided June 16, 1959, ... Fed. 2d .....

(3) The Order to Show Cause issued by this court is discharged and the order staying all proceedings in the district court is vacated and set aside.

(Endorsed:) Per Curiam Opinion. Filed Aug. 18, 1959.

Paul P. O'Brien, Clerk.

Appendix C

United States Court of Appeals
for the Ninth Circuit

Leonard Wesley Parker, Petitioner, vs. Honorable J. L. McCarrey, Jr., District Judge of the District Court for the Territory of Alaska, Third Division, Respondent.	No. 16,499 June 16, 1959

On Motion for Leave to File Petition for Writs of Prohibition and Mandamus and on Petition for Writs of Prohibition and Mandamus.

Before: Chambers, Barnes and Jertberg, Circuit Judges.

Per Curiam:

Alaska became the 49th state of the United States and ceased to be a territory by virtue of the President's proclamation on January 3, 1959.[1] Under the Alaska Enabling Act,[2] the existing territorial court with its four divisions[3] was continued upon an interim basis for an indefinite time, but not to exceed three

[1] Proclamation No. 3269, 24 F.R. 81.
[2] Public Law 85-508, 72 Stat. 333.
[3] 48 U.S.C. 101.

years.[4] Thus, the act contemplated some delay on the part of the new state in establishing its own state court system.

On October 24, 1958, Parker was indicted by the grand jury of the Third Division of the United States District Court for the Territory of Alaska, which charged him with theft of United States government property. Having to no avail attacked (since January 3, 1959) the "territorial" court's jurisdiction in that court and being under the threat of impending trial there, Parker asks us to issue a writ of prohibition or a writ of mandamus to stop the proceedings there. Petition to file the petition heretofore lodged is granted and the petition is dismissed for lack of jurisdiction in this court.

It seems clear that the effect of the Enabling Act is to generally restrict this court's jurisdiction on decisions or judgments rendered in Alaska after January 3, 1959, to those coming up from the newly created "U. S. District Court for the District of Alaska" is an existence now and is just not staffed, or it may be that it comes into existence when the President appoints the Federal district judge therefor. That is a question we do not decide. No one has suggested that the "territorial court" which continues to act is the new United States District Court for the District of Alaska. And, such a suggestion could have no sensible basis.

It would appear that the amendments to Titles 18 and 28 made by Section 12 of the Enabling Act would automatically restrict our Alaska jurisdiction on "new

[4]Sections 12, 13, 14, 15, 16, 17, 18, the "judicial sections" of the Enabling Act, will be set forth for reference as an appendix to this opinion.

business" to the United States District Court for the District of Alaska. Further, we think that is the net express effect of Sections 13, 14, 15, 16, 17 and 18, when read together.

The subject of this petition presents a very practical problem for all Alaska. This court is asked to ascertain and define the nature of the continued interim United States District Court (with its four divisions) for the Territory of Alaska and to base its decision herein upon that determination. In our view it would be unwise to accept the invitation. We believe that having said the interim court is not the United States District Court for the District of Alaska we cannot speak authoritatively beyond that point.

We are urged by Parker to issue a writ to protect our eventual jurisdiction when Parker's problems come to us through the United States District Court for the District of Alaska. We can predict that there will be life in the United States District Court for the District of Alaska, but that Parker would have some cause for appeal or that he would even be prosecuted there is too speculative for us to issue an extraordinary writ.

In the spirit of helpfulness we might give our views on the current Alaska court situation, but if we cannot speak with the authority of a pronouncement that is required for decision, we deem it unwise to speculate as to the nature of the interim court. Thus, we must leave it on the basis of that which it is not, rather than on that which it is.

(Endorsed:) Opinion. Filed June 16, 1959.
Paul P. O'Brien, Clerk.

Appendix D

United States Court of Appeals
for the Ninth Circuit

Mary Bridges, Petitioner, vs. Honorable Vernon D. Forbes, District Judge of the Territory (now State) of Alaska, Fourth Division, and John B. Hall, Clerk of the Fourth Judicial District of said District Court, Respondents, and vs. Alaska Housing Authority, a public corporate authority, Intervenor.	No. 16,487

Before: Chambers and Jertberg, Circuit Judges, and Ross, District Judge.

The petition for rehearing and the petitioner's request that this Court certify to the United States Supreme Court the question of this Court's appellate jurisdiction are and each of them is denied.

/s/ Richard H. Chambers
/s/ Gilbert H. Jertberg
U. S. Circuit Judges,
/s/ John R. Ross
U. S. District Judge

Endorsed
Filed October 6, 1959
Paul P. O'Brien,
Clerk

Appendix E

Constitution of the United States, Article IV, Sec. 4.

"The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence."

Constitution of Alaska, Article XV, Sec. 17.

Article XV—Schedule of Transitional Measures. To provide an orderly transition from a territorial to a state form of government, it is declared and ordained:

* * *

Section 17. "Until the courts provided for in Article IV are organized, the courts, their jurisdiction, and the judicial system shall remain as constituted on the date of admission unless otherwise provided by law. When the state courts are organized, new actions shall be commenced and filed therein, and all causes, other than those under the jurisdiction of the United States, pending in the courts existing on the date of admission, shall be transferred to the proper state court as though commenced, filed, or lodged in those courts in the first instance, except as otherwise provided by law."

Sections 12-18, Alaska Enabling Act, Public Law 85-508, 72 Stat. 339.

Sec. 12. Effective upon the admission of Alaska into the Union—

(a) The analysis of chapter 5 of title 28, United States Code, immediately preceding sec-

tion 81 of such title, is amended by inserting immediately after and underneath item 81 of such analysis, a new item to be designated as item 81A and to read as follows: "81A. Alaska";

(b) Title 28, United States Code, is amended by inserting immediately after section 81 thereof a new section, to be designated as section 81A, and to read as follows: "Sec. 81A. Alaska".

"Alaska constitutes one judicial district.

"Court shall be held at Anchorage, Fairbanks, Juneau, and Nome.";

(c) Section 133 of title 28, United States Code, is amended by inserting in the table of district and judges in such section immediately above the item: "Arizona * * * 2", a new item as follows: "Alaska * * * 1";

(d) The first paragraph of section 373 of title 28, United States Code, as heretofore amended, is further amended by striking out the words: "the District Court for the Territory of Alaska.": *Provided*, That the amendment made by this subsection shall not affect the rights of any judge who may have retired before it takes effect;

(e) The words "the District Court for the Territory of Alaska," are stricken out wherever they appear in sections 333, 460, 610, 753, 1252, 1291, 1292 and 1346 of title 28, United States Code;

(f) The first paragraph of section 1252 of title 28, United States Code, is further amended by striking out the word "Alaska," from the clause relating to courts of record;

(g) Subsection (2) of section 1294 of title 28, United States Code, is repealed and the later sub-

sections of such section are renumbered accordingly:

(h) Subsection (a) of section 2410 of title 28, United States Code, is amended by striking out the words: "including the District Court for the Territory of Alaska,";

(i) Section 3241 of title 18, United States Code, is amended by striking out the words: "District Court for the Territory of Alaska, the";

(j) Subsection (c) of section 3401 of title 18, United States Code, is amended by striking out the words: "for Alaska or";

(k) Section 3771 of title 18, United States Code, as heretofore amended is further amended by striking out from the first paragraph of such section the words: "the Territory of Alaska,";

(l) Section 3772 of title 18, United States Code, as heretofore amended, is further amended by striking out from the first paragraph of such section the words: "the Territory of Alaska,";

(m) Section 2072 of title 28, United States Code, as heretofore amended, is further amended by striking out from the first paragraph of such section the words: "and of the District Court for the Territory of Alaska";

(n) Subsection (q) of section 376 of title 28, United States Code, is amended by striking out the words: "the District Court for the Territory of Alaska,"; *Provided*, That the amendment made by this subsection shall not affect the rights under such section 376 of any present or former judge of the District Court for the Territory of Alaska or his survivors;

(o) The last paragraph of section 1963 of title 28, United States Code, is repealed:

(p) Section 2201 of title 28, United States Code, is amended by striking out the words: "and the District Court for the Territory of Alaska"; and

(q) Section 4 of the Act of July 28, 1950 (64 Stat. 380; 5 U.S.C., sec. 341b) is amended by striking out the word: "Alaska,".

SEC. 13. No writ, action, indictment, cause, or proceeding pending in the District Court for the Territory of Alaska on the date when said Territory shall become a State, and no case pending in an appellate court upon appeal from the District Court for the Territory of Alaska at the time said Territory shall become a State, shall abate by the admission of the State of Alaska into the Union, but the same shall be transferred and proceeded with as hereinafter provided.

All civil causes of action and all criminal offenses which shall have arisen or been committed prior to the admission of said State, but as to which no suit, action, or prosecution shall be pending at the date of such admission, shall be subject to prosecution in the appropriate State courts or in the United States District Court for the District of Alaska in like manner, to the same extent and with like right of appellate review, as if said State has been created and said courts had been established prior to the accrual of said causes of action or the commission of such offenses; and such of said criminal offenses as shall have been committed against the laws of the Territory shall be tried and punished by the appropriate

courts of said State, and such as shall have been committed against the laws of the United States shall be tried and punished in the United States District Court for the District of Alaska.

Sec. 14. All appeals taken from the District Court for the Territory of Alaska to the Supreme Court of the United States or the United States Court of Appeals for the Ninth Circuit, previous to the admission of Alaska as a State, shall be prosecuted to final determination as though this Act had not been passed. All cases in which final judgment has been rendered in such district Court, and in which appeals might be had except for the admission of such State, may still be sued out, taken, and prosecuted to the Supreme Court of the United States or the United States Court of Appeals for the Ninth Circuit under the provisions of then existing law, and there held and determined in like manner; and in either case, the Supreme Court of the United States, or the United States Court of Appeals, in the event of reversal, shall remand the said cause to either the State Supreme Court or other final Appellate Court of said State, or the United States District Court for said district, as the case may require: *Provided*, That the time allowed by existing law for appeals from the District Court for said Territory shall not be enlarged thereby.

Sec. 15. All causes pending or determined in the District Court for the Territory of Alaska at the time of the admission of Alaska as a State which are of such nature as to be within the jurisdiction of a District Court of the United States shall be transferred

to the United States District Court for the District of Alaska for final disposition and enforcement in the same manner as is now provided by law with reference to the judgments and decrees in existing United States District Courts. All other causes pending or determined in the District Court for the Territory of Alaska at the time of the admission of Alaska as a State shall be transferred to the appropriate State Court of Alaska. All final judgments and decrees rendered upon such transferred cases in the United States District Court for the District of Alaska may be reviewed by the Supreme Court of the United States or by the United States Court of Appeals for the Ninth Circuit in the same manner as is now provided by law with reference to the judgments and decrees in existing United States District Courts.

SEC. 16. Jurisdiction of all cases pending or determined in the District Court for the Territory of Alaska not transferred to the United States District Court for the District of Alaska shall devolve upon and be exercised by the Courts of original jurisdiction created by said State, which shall be deemed to be the successor of the District Court for the Territory of Alaska with respect to cases not so transferred and, as such, shall take and retain custody of all records, dockets, journals, and files of such Court pertaining to such cases. The files and papers in all cases so transferred, shall be in like manner transferred to said District Court.

SEC. 17. All cases pending in the District Court for the Territory of Alaska at the time said Territory be-

comes a State not transferred to the United States District Court for the District of Alaska, shall be proceeded with and determined by the Courts created by said State with the right to prosecute appeals to the Appellate Courts created by said State, and also with the same right to prosecute appeals or writs of certiorari from the final determination in said causes made by the Court of last resort created by such State to the Supreme Court of the United States, as now provided by law for appeals and writs of certiorari from the Court of last resort of a State to the Supreme Court of the United States.

SEC. 18. The provisions of the preceding sections with respect to the termination of the jurisdiction of the District Court for the Territory of Alaska, the continuation of suits, the succession of Courts, and the satisfaction of rights of litigants in suits before such Courts, shall not be effective until three years after the effective date of this Act, unless the President, by Executive order, shall sooner proclaim that the United States District Court for the District of Alaska, established in accordance with the provisions of this Act, is prepared to assume the functions imposed upon it. During such period of three years or until such Executive order is issued, the United States District Court for the Territory of Alaska shall continue to function as heretofore. The tenure of the judges, the United States attorneys, marshals, and other officers of the United States District Court for the Territory of Alaska shall terminate at such time as that Court shall cease to function as provided in this section.

Appendix F

LEGISLATIVE HISTORY OF SEC. 18, PL-85-508

Excerpt from Brief for the Attorney General of the United States as Amicus Curiae, in the United States Court of Appeals for the Ninth Circuit, *Parker v. McCarrey*, No. 16,499, p. 7.

> "The comments on these bills by the Department of Justice, requested by the Senate and House Committees on Interior and Insular Affairs, drew the attention of Congress to Article XV, Section 17 of the Alaska Constitution. It thus became apparent that at the time of the admission of Alaska as a State, the Alaska State court system would not yet be established and that the existing courts were expected to continue their operations until the permanent courts provided for in the Constitution of Alaska would be organized and functioning (S. Rept. 1163, 85th Cong., 1st Sess., pp. 48-49; H. Rept. 624, 85th Cong., 1st Sess., pp. 32-33). Congress thereupon added a new section now Section 18—to the Alaska Statehood Act."

See also, 1958, U.S. Code Congressional and Administrative News, Vol. 12, p. 2457.

Appendix G

P.L. 85-508, 72 Stat. 348.

Sec. 8. * * * (d) Upon admission of the State of Alaska into the Union as herein provided, all of the Territorial laws then in force and effect throughout said State except as modified or changed by this Act, or by the constitution of the State, or as thereafter modified or changed by the legislature of the State. All of the laws of the United States shall have the same force and effect within said State as elsewhere within the United States. As used in this paragraph, the term "Territorial laws" includes (in addition to laws enacted by the Territorial Legislature of Alaska) all laws or parts thereof enacted by the Congress the validity of which is dependent solely upon the authority of the Congress to provide for the government of Alaska prior to the admission of the State of Alaska into the Union, and the term "laws of the United States" includes all laws or parts thereof enacted by the Congress that (1) apply to or within Alaska at the time of the admission of the State of Alaska into the Union, (2) are not "Territorial laws" as defined in this paragraph, and (3) are not in conflict with any other provisions of this Act.

FILE COPY

FILED

In the Supreme Court
of the
United States

October Term, 1955

No. 616

MARY BUDOSS,

Petitioner,

vs.

HONORABLE VERNON D. FORBES, District Judge of the Territory (now State) of Alaska, Fourth Division, and JOHN B. HALE, Clerk of the Fourth Judicial District of said District Court,

Respondents,

and vs.

ALASKA HOUSING AUTHORITY, a public corporate authority,

Intervenor.

REPLY TO PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

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In the Supreme Court
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and vs.

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Intervenor.

REPLY TO PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

INTRODUCTION.

The Alaska Housing Authority, identified as "Intervenor" in the caption, respectfully submits this reply brief in opposition to the Petition of Mary Bridges for a Writ of Certiorari.

JURISDICTION.

Petitioner states on page 11 of her petition that federal jurisdiction is invoked "upon the fact that the proceedings in the court of first instance were begun prior to the admission of Alaska into the Union." No statutory reference is alluded to by petitioner. In the complaint filed by the intervenor, nothing was included therein to suggest that federal jurisdiction was being invoked and it is apparent that the trial court was acting in the capacity of a state court in entertaining the proceedings set forth in the complaint. (In the interim, since the United States Court of Appeals opinion of August 18, 1959, the petitioner has also appealed to the Supreme Court of the State of Alaska and on December 23, 1959 was rendered a favorable decision on which intervenor is now requesting a rehearing. (See Intervenor's Appendix A.) The affirmative assertion of jurisdiction in the Supreme Court is vital, and it is intervenor's position that petitioner's allegation of federal jurisdiction is insufficient and does not vest this court with the necessary jurisdiction to entertain the petition. However, assuming this Court will take jurisdiction to determine

jurisdiction, the intervenor submits this brief in opposition to the petition.

QUESTION PRESENTED.

It is urged that the sole question presented to this Court is whether or not the United States Court of Appeals for the Ninth Circuit under applicable statutes has jurisdiction to entertain appealable decisions and judgments rendered by the District Court for the Territory of Alaska during the period following the formal granting of Statehood on January 3, 1959.

ARGUMENT.

I.

THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DOES NOT HAVE JURISDICTION TO ENTERTAIN APPEALS FROM THE DISTRICT COURT OF ALASKA.

As the intervenor understands petitioner's argument, the blending of Section 17 of Article XV of the Alaska Constitution and the Statehood Act (P.L. 85-508, 72 Stat. 339, See Pet. Br., Appendix C), creates the necessary jurisdiction in the United States Court of Appeals for the Ninth Circuit to entertain the interlocutory appeal from the District Court of Alaska. This blending is presumably found by examining the Constitution and the Admission Act and discovering therein the intent of Congress and the State's Constitutional Convention held in 1955, at which time the Constitution for the State of Alaska was drafted.

Section 17 of Article XV of the State Constitution reads as follows:

> Section 17. Transfer of Court Jurisdiction. Until the courts provided for in Article IV are organized, the courts, their jurisdiction, and the judicial system shall remain as constituted on the date of admission unless otherwise provided by law. When the state courts are organized, new actions shall be commenced and filed therein, and all causes, other than those under the jurisdiction of the United States, pending in the courts existing on the date of admission, shall be transferred to the proper state court as though commenced, filed, or lodged in those courts in the first instance, except as otherwise provided by law.

The "judicial system" of Alaska as used in Section 17, quoted above, is nowhere defined and there is no indication that the delegates at the convention had anything more in mind than to retain a "judicial system," consisting of (1) the District Court of Alaska, (2) the Commissioner's Courts (Ex-Officio Justice of the Peace) and (3) the Municipal Courts. It is hard to imagine the delegates at the convention being of the opinion that they could incorporate the United States Court of Appeals for the Ninth Circuit—a federal court—as part of a state "judicial system", even during an interim transitional period.

Indeed, whether or not the drafters of the State Constitution had any part of the federal judiciary in mind, as contended by the petitioner, is purely speculative. (See Pet. Br., pp. 12 and 13.) In the years just prior to Statehood there had been considerable

agitation by the citizens of Alaska for a territorial judicial system such as had existed in the Territory of Hawaii for several decades. The reference in Section 17 cannot be identified with any particular court system, and this is particularly true if viewed, not in hindsight, but in 1955, when the Constitution was drafted.

Petitioner appears to suggest that an "offer" was made by the enactment of Article XV, Section 17 of the State Constitution and that there has been an "acceptance" of this offer manifested by liberally reading certain portions of the Statehood Bill. In other words, in 1955 the Territory of Alaska's delegates to the constitutional convention put some sort of continuing offer in the State Constitution and, supposedly, in 1958 the federal government accepted this offer and the result was an alleged agreement by "reciprocal actions" between the state and the federal governments.

Having presumably established the premise that through "reciprocal action" a judicial system was established which included the United States Court of Appeals for the Ninth Circuit, petitioner finds herself confronted with Section 18 of the Statehood Bill. Section 18 declares that the proposed discontinuance of the *District Court for the Territory of Alaska* (as spelled out in the previous sections) is to be put in abeyance "until three (3) years after the effective date" (or January 3, 1959) of the Statehood Act "unless the President, by executive order, shall sooner proclaim that the United States District Court for

the District of Alaska established in accordance with the provisions of this act, is prepared to assume the functions imposed upon it." In other words, Section 18 permitted the District Court for Alaska to stay in existence for a period not to exceed three years. There is no ambiguity and Congress was explicit that it was only the continued use of the federal *District Court* in Alaska that was to be allowed subsequent to January 3, 1959, the date Statehood was formally granted Alaska. No such extension of time was authorized insofar as the United States Court of Appeals was concerned. The repeated reference to the "District Court for the Territory of Alaska" within Section 18 makes it obvious Congress was intentionally sanctioning the continuing use of its territorial court, an Article I Court under the Constitution of the United States, i.e. the "District Court for the Territory of Alaska", but not the United States Court of Appeals for the Ninth Circuit, an Article III Court.

The courts with which we are involved herein are creatures of the federal government and as such, the federal government can impose such conditions and limitations as it decides. The *Parker v. McCarrey* decision (Pet. Br., Appendix C) cited by the Appellate Court in denying petitioner's contention it had jurisdiction in the cause is a proper—and the only—interpretation of Section 18 of the Statehood Act and its finding of no jurisdiction should be sustained.

II.

THE CREATION OF THE SUPREME COURT FOR THE STATE OF ALASKA FURTHER FORECLOSES THE QUESTION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT HAVING ANY JURISDICTION IN THIS CAUSE.

As noted earlier, petitioner has also carried its appeal to the Supreme Court of the State of Alaska. (See Appendix A.) It is submitted that the establishment of the Supreme Court of the State of Alaska lends further argument against the United States Court of Appeals for the Ninth Circuit having any jurisdiction in the present proceedings.

The Alaska Constitution provides in its Article IV for a permanent system of state courts. Article XV of the Constitution, entitled "Schedule of Transitional Measures", continues in force the territorial laws as state laws (Section 1), and saves all existing rights and liabilities and "all civil, criminal, or administrative proceedings," as to which "*the State shall be the legal successor to the Territory in these matters*" (Section 2). (Emphasis added.) Again, Section 17 of Article XV provides:

> Until the courts provided for in Article IV are organized, the courts, their jurisdiction, and the judicial system shall remain as constituted on the date of admission unless otherwise provided by law. *When the State courts are organized,* new actions shall be commenced and filed therein, and *all causes, other than those under the jurisdiction of the United States, pending in the courts existing on the date of admission, shall be transferred to the proper state court as though commenced, filed, or lodged in those courts in the first*

instance, except as otherwise provided by law. (Emphasis added.)

In view of the fact that the appellate jurisdiction of the Ninth Circuit, over post-statehood judgments of the interim courts was in doubt, the first Alaska legislature, in March 1959, amended subsection (4), Section 32, ch. 50, SLA 1959, to read as follows:

> (4) Notwithstanding the provisions of subsections (1), (2) and (3) of this section, in the event that either: a court of competent jurisdiction, by final judgment, declares that the District Court of the State of Alaska lacks jurisdiction to determine causes arising under the laws of the State, notwithstanding the provisions of Public Law 508, 85th Congress; or the President of the United States, by executive order, terminates the jurisdiction of the District Court of the State of Alaska; the Judicial Council shall forthwith meet and submit to the Governor the names of the persons nominated as justices or judges of all of the supreme and one or more or all superior courts of the State and in any event shall submit all of said names prior to January 3, 1962. *In the event that a court of competent jurisdiction by final judgment, declares that the United States Court of Appeals for the Ninth Circuit lacks jurisdiction to hear appeals from the District Court of the State of Alaska, the Judicial Council shall forthwith meet and submit to the Governor the names of the persons nominated as justices of the supreme court.* If, upon the occurrence of any of the events set forth in this subsection, the members of the first Judicial Council have not been

appointed, the Governor shall forthwith fill the initial vacancies of the non-law members.

Accordingly, following the Ninth Circuit's decision in *Parker v. McCarrey* on June 16, 1959, that it has no appellate jurisdiction over the decisions and judgments of the interim courts rendered after January 3, 1959, the Judicial Council established under Section 16, Article XV of the Alaska Constitution, met on July 15, 1959, to consider nominations for the Supreme Court of Alaska. The Governor appointed the Justices of that court on July 29, 1959.

The Supreme Court of Alaska is now the highest court of the State and the court of last resort on matters of state law (including, of course, former territorial law). Since the *Mary Bridges* case involves only such a matter, it is apparent that this is the court to which she should and has addressed her application for relief. Regardless, therefore, of the controlling effect *vel non* of the *Parker* decision, in view of this new development in the establishment of the Alaska judiciary, the United States Court of Appeals for the Ninth Circuit was—and is—no more the appropriate appellate forum for the relief sought than if the case had originated in a *nisi prius* court of the State of (e.g.) California.

This conclusion is also entirely in accord with the Alaska Statehood Act. If the argument is accepted that Congress, in Section 1 of the Act, "accepted, ratified, and confirmed" the Alaska Constitution then it consented to the disposition of causes involving mat-

ters of State law in accordance with the scheme set forth in Section 17, Article XV of the Constitution (supra). Accordingly, Section 17 of the Statehood Act provides:

> All cases pending in the District Court for the Territory of Alaska at the time said Territory becomes a State not transferred to the United States District Court for the District of Alaska shall be proceeded with and determined by the courts created by said State with the right to prosecute appeals or writs of certiorari from the final determination in said causes made by the court of last resort created by such State to the Supreme Court of the United States, as now provided by law for appeals and writs of certiorari from the court of last resort of a State to the Supreme Court of the United States.

While Section 18 of the Act suspends the operation of Sections 13 through 17 "with respect to the termination of the jurisdiction of the District Court for the Territory of Alaska, the continuation of suits, the succession of courts, and the satisfaction of rights of litigants in suits before such courts" for a prescribed period, it obviously was not intended to suspend the State's sovereign power to establish, pursuant to its Constitution, an appellate court when the State should deem it necessary to do so.

CONCLUSION.

For the reason set forth above, it is respectfully requested that the petition for the writ of certiorari be denied.

Dated, Fairbanks, Alaska,
January 14, 1960.

Respectfully submitted,
JOHN R. CONNOLLY,
Attorney for Intervenor.

CLIFFORD J. GROH,
HENRY J. CAMAROT,
Of Counsel.

(Appendix "A" Follows.)

Appendix "A"

OPINION

[December 22, 1959.]

Petition for Review From the District Court for the District of Alaska, Fourth Judicial Division.

Before: Nesbett, Chief Justice, and Hodge and Dimond, Associate Justices.

Dimond, Associate Justice.

The question for decision is whether the Alaska Housing Authority, in the exercise of its power of eminent domain, may use a declaration of taking.

On June 9, 1958, the Authority filed a complaint for the purpose of condemning certain real property of petitioner in connection with a slum clearance and urban redevelopment program within the boundaries of what is designated as "Urban Renewal Project T. A. R-7", in the City of Fairbanks, Alaska. On the same day it also filed an instrument entitled "Declaration of Taking", asserting that the right to take petitioner's property in this manner had been conferred on the Authority by Section 57-7-1 ACLA 1949, Section 8 of Chapter 105 SLA 1951 [Section 40-7A-9 ACLA 1949 Cum. Supp.], Chapter 90 SLA 1953[1], and Chapter 122 SLA 1955 [Sections 16-1-103, 16-1-104 Cum. Supp.].

[1]No reference is made in the declaration of taking to Ch. 138 SLA 1955 which amended Ch. 90 SLA 1953. These acts, as further amended by Ch. 146 SLA 1959, now appear in the Alaska Compiled Laws Cumulative Supplement as Sections 57-7-24 to 57-7-29.

Petitioner moved to dismiss the complaint and the action, to strike the summons and quash the service of summons, and to strike the declaration of taking. In a memorandum opinion filed on August 23, 1958, Judge J. L. McCarrey, Jr. erroneously held that the question as to the declaration of taking had been raised on the motion to dismiss, rather than on the motion to strike; and considering that point only, said:

> "The Court feels that the meaning of the statute[2] is clear though perhaps not well articulated, and that the Alaska Housing Authority may use Sections 57-7-24 through 57-7-29 ACLA 1949 Supp. to conduct condemnation proceedings.
>
> "The Territorial Legislature has made a valid attempt to provide for future contingencies in the ever changing field of urban renewal and eminent domain. Where the legislative intent is clear, it should be followed.
>
> "Therefore, the motion to dismiss is denied."

Petitioner was ordered to give possession of her property to the Authority not later than October 2, 1958. On March 30, 1959, a writ of assistance was issued in aid of such order granting possession. Petitioner moved to quash the writ, but this was denied on May 1, 1959—the district court stating:

> ". . . it is the opinion of this Court that the Order aforesaid involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal

[2] Sec. 40-7A-9 Cum. Supp.

from the Order may materially advance the ultimate termination of the litigation."

Petitioner asks us to review the lower court's determinations under Rules 23-33 of the Rules of this Court. Respondents have not filed a memorandum in opposition "disclosing any matter or ground why the relief sought by the petition should not be granted."[3]

We grant the petition. The decision that the Authority may avail itself of a declaration of taking in eminent domain is of such importance as to justify deviation from the normal appellate procedure by way of appeal from a final judgment and to require the *prompt* attention of this court.

The concept of a declaration of taking in connection with eminent domain was first brought into existence in Alaska in 1953 when the Territorial legislature provided that—

> "In any proceeding instituted by and in the name of the Territory of Alaska involving the acquisition of any real property or any interests therein or any easement for public highway purposes the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the Territorial authority empowered by law to acquire the real property or any interests therein or any easement described in the petition, declaring that said real property or any interests therein or any easement is

[3] Rule 29(a), Rules of the Supreme Court.

thereby taken for the use of the Territory of Alaska:"[4]

The statute prescribed what must be contained in the declaration, and then stated that when it was filed and the amount of estimated compensation deposited with the court—

> "... title to the real property in fee simple absolute ... shall vest in the Territory of Alaska, and ... shall be deemed to be condemned and taken for the use of the Territory of Alaska, and the right to just compensation for the same shall vest in the persons entitled thereo."[5]

The court was to then fix the time within which and the terms upon which possession of the property must be surrendered to the condemning authority, which could not be before the expiration of the time allowed a defendant to move to strike the declaration and dismiss the suit if he wished to raise any question with respect to the validity of the taking.[6] Failure to file such a motion constituted a waiver of the right to challenge the validity of the taking.

In 1955 this authority was extended so that the Territory could utilize a declaration of taking, not only for highway purposes, but "for any purpose for which the Territory is authorized the power of eminent domain."[7] In addition, at the same legislative session,

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[4]Ch. 90 SLA 1953, Sec. 1.
[5]ibid.—Secs. 2 and 3.
[6]ibid.—Secs. 4, 6.
[7]Ch. 138 SLA 1955.

cities of the first class were permitted to use a declaration of taking—

> "In the exercise of eminent domain for street or highway, school, sewer, water, telephone, electric, other utility, and slum clearance purposes and use granted to cities of the first class . . ."[8]

The history of this statute shows that the legislature refused to extend such authority to other than first class cities, and in addition, limited the power to the purposes specified rather than to any purpose for which such cities were authorized the use of eminent domain.[9]

Nothing further was done until four years later when, in 1959, the first State legislature permitted the use of a declaration of taking by any public utility district or school district.[10] But at the same legislative session, the House of Representatives indefinitely postponed a bill which would have extended this power to—

> ". . . any person, firm, municipal corporation, association or corporation authorized to transact business in the state for the purpose of constructing, maintaining, or operating electric light and power plants, water plants, sewer systems, telephone or other public utilities . . ."[11]

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[8]Ch. 122 SLA 1955.

[9]Journal of the House—Alaska Legislature—1955.

[10]Ch. 146 SLA 1959.

[11]Committee Substitute for House Bill 126—House Journal, p. 949.

When the Alaska Housing Authority was created in 1945, for the purpose of undertaking slum clearance and providing low cost housing projects, there was conferred upon it the power—

> ". . . to acquire by eminent domain under Sections 57-7-1 to 57-7-23 Compiled Laws of Alaska 1949, or otherwise, real and personal property . . ."[12]

In 1949 the scope of the Authority's powers was enlarged so as to encompass the construction of what were termed "moderate cost and rental dwelling units." The power of eminent domain was again referred to—Section 12 of this act permitting the Authority—

> ". . . to acquire by . . . condemnation, or otherwise . . . such lands . . . as may be necessary or desirable for the establishment, construction and operation of such housing. * * *"[13]

The Slum Clearance and Redevelopment Law was enacted in 1951.[14] Its purpose was to provide for the clearance of slum and blighted areas and to develop them for more beneficial uses. Section 5 of the act, entitled "Powers of Authority", provides in subdivision (c) that the Alaska Housing Authority shall have the power—

> "Within its area of operation, to . . . acquire by . . . eminent domain or otherwise, any real or per-

[12]Sec. 40-7-6 ACLA 1949.
[13]Ch. 13 SLA 1949.
[14]Ch. 105 SLA 1951.

sonal property or any interest therein, together with any improvements thereon, necessary, or incidental to a redevelopment project . . ."

Section 8, entitled "Eminent Domain", says this:

"The Authority shall have the right to acquire by the exercise of the power of eminent domain any real property which it may deem necessary within the boundaries of a redevelopment project or for its purposes under this Act after the adoption by it of a resolution declaring that the acquisition of the real property described therein is necessary for such purposes. The Authority may exercise the power of eminent domain in the manner provided in Sections 57-7-1 to 57-7-23 of the Compiled Laws of Alaska, 1949, and acts amendatory thereof or supplementary thereto, or it may exercise the power of eminent domain in the manner now or which may be hereafter provided by any other statutory provisions for the exercise of the power of eminent domain. Property already devoted to a public use may be acquired in like manner, provided that no real property belonging to the municipality or the Territory may be acquired without its consent."

The right to use a declaration of taking has not been specially granted to the Alaska Housing Authority, as it has been to the Territory (now State) of Alaska, to first class cities, and to school and public utility districts. The right did not exist at all in 1951 when for the last time the legislature spoke of the exercise of eminent domain by the Authority.[15] And

[15]Ch. 105 SLA 1951.

respondent is not the Territory or State of Alaska. It is a public corporate authority, and no more the "Territory" or "State" than is a city or school or public utility district. This is clear from the congressional enabling legislation and from the acts of the Territorial legislature creating the Authority and giving it the powers that it has.[16]

If the power exists at all, it would be by implication, and then only from a liberal reading of the language of Section 8 of Chapter 105 SLA 1951, where the legislature, after having granted the power of eminent domain to the Authority, said that it might exercise such power—

> "... in the manner provided in Sections 57-7-1 to 57-7-23, of the Compiled Laws of Alaska, 1949, and acts amendatory thereof or supplementary thereto, or it may exercise the power of eminent domain in the manner now or which may be hereafter provided by any other statutory provisions for the exercise of the power of eminent domain."

But this is not enough. The incorporation by reference of amendatory and supplementary acts and other statutory provisions which might be enacted later may not be construed as conferring on the Authority any additional or different power of eminent domain. The use of the words "manner provided" must be held to refer to matters of procedure in the exercise of a power otherwise expressly given.

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[16] 48 USCA Secs. 480 et seq.; Secs. 40-7-2, 40-7-6 ACLA 1949; Ch. 105, Sec. 3, SLA 1951, [Sec. 40-7A-4 ACLA 1949 Cum. Supp.].

It apparently was not intended that the declaration of taking power should merely supplement the procedural aspects of the then existing statutory provisions on eminent domain. If it had been, then it would have been enough to simply amend one or more of Sections 57-7-1 to 57-7-23 and say that those who have the power of eminent domain may exercise it by way of a declaration of taking.

But the legislature chose not to do this. The history of the statutes on this subject show that the legislature was particular in selecting those upon whom the power would be conferred and particular also in confining this authority within definite limits.

The declaration of taking is a power of eminent domain, and not only a manner of exercising a power otherwise conferred. More than procedure is involved; substantive rights are affected.

Under Sections 57-7-1 to 57-7-23 the condemning authority is not able to take possession of a defendant's property until ". . . after the report and assessment of damages by the commissioners has been made and filed in the court . . ."[17] And before that event could take place, there had to be a complaint filed, a summons and order to show cause issued, and apparently, a determination by the court that the use for which the property was sought to be appropriated was a public use, or that the public interests required the taking of the lands sought to be condemned.[18]

[17] See. 57-7-21 ACLA 1949.

[18] Sees. 57-7-9, 57-7-10, 57-7-12 ACLA 1949.

In addition, Section 57-7-6 appears to require the court, prior to the time that the property may be taken from a defendant, to make specific findings (1) that the use to which the property is to be applied is a use authorized by law, and (2) that the taking of the property is necessary to such use. The Court of Appeals for the Ninth Circuit has construed this section of the statute as requiring the court to find those facts "before condemnation", and has held that—

> "It is upon findings so made that there is established a basis for further proceedings. The findings constitute the decision of the court upon the vital question of whether or not the property sought to be condemned can be condemned at all."[19]

Finally, the third paragraph of Section 57-7-27 Cum. Supp. states that the right to take possession and title in advance of final judgment—

> ". . . shall be *in addition to any right, power or authority* conferred by the condemning agency under which such proceedings may be conducted, and shall not be construed as abrogating, limiting, or modifying any such right, power or authority." (Emphasis added.)

And when the right to use a declaration of taking was extended to first class cities, it was provided that a city could proceed in the same manner "and with the

[19] *Van Dyke v. Midnight Sun Mining & Ditch Co.*, 177 F. 8[illegible] 3 Alaska Fed. 458 (CA-9, 1910).

same power" as provided for the use of a declaration of taking by the Territory of Alaska.[20]

A declaration of taking enlarges the rights of the condemning authority and reduces those of the landowner. Upon the filing of the declaration and a deposit of the amount of compensation estimated to be due, title to the real property vests in the condemning agency and "such real property . . . shall be deemed to be condemned and taken for the use of the condemning agency . . ."[21] And then, without the necessity of awaiting the report of the commissioners and assessment of damages, the court is given the power "to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession" to the condemning authority.

We conclude, therefore, that the Alaska Housing Authority may not use a declaration of taking. We say this—not only with acknowledgment of the rule that a grant of power of eminent domain is to be strictly construed against the condemning party and in favor of the property owner[22]—but because a logical interpretation of all of the statutes on this subject and their legislative history requires this result.

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[20] Ch. 122, Sec. 2, SLA 1955 (Sec. 16-1-104 Cum. Supp.).

[21] Sec. 57-7-26 Cum. Supp., as amended by Ch. 146 SLA 1959.

[22] *Sutherland Statutory Construction*, 3rd Ed., Vol. 3, Sec. 6504, pp. 249 et seq. Cf. *Botts v. Southeastern Pipeline Co.*, 10 SE 2d 375 (Supreme Court of Georgia 1940); *Northern Mining & Trading Co. v. Alaska-Gold Recovery Co.*, 20 F. 2d 5, 5 Alaska Fed. 351, 357 (CA-9, 1927).

The petition is granted and the following orders in Civil Action No. 10,017[23] are reversed:

(1) The order denying petitioner's motion to dismiss, contained in the memorandum opinion of Judge J. L. McCarrey, Jr., filed on August 23, 1958.

(2) The "Order Granting Possession to Plaintiff", filed September 12, 1958, so far as it relates to petitioner, Mary Bridges.

(3) Paragraph "(1)" of the "Final Order Denying Defendant Mary Bridges' Motion to Quash Writ of Assistance", filed May 1, 1959.

In a separate action[24] petitioner has sought an injunction and damages against the respondents. On November 12, 1959, the district court entered an order staying and abating all proceedings in that case until final determination in the condemnation action (No. 10,017) or until such time as may be otherwise ordered by a successor court or an appellate court having jurisdiction over the proceedings. Petitioner asks us to review that order also and to reverse it. In view of the conclusions reached here, the petition is denied.

The cases are remanded to the district court for proceedings in conformity with this opinion.

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[23] *Alaska Housing Authority, Plaintiff v. Certain Parcels of Land in Fairbanks Townsite, Alaska, etc.—and Mary Bridges, Defendants.*

[24] *Mary Bridges, Plaintiff v. Alaska Housing Authority, a public corporation, and Elmer Gagnon, and M. G. Gebhart, Defendants,* Civil Action No. 10,726